

24 July 2017

Department of Planning & Environment  
GPO Box 39  
Sydney NSW 2001

### Submitted online

Dear Department of Planning & Environment,

### **Environmental Planning & Assessment Amendment (Staged development Applications) Bill 2017**

As you know, EDO NSW is a community legal centre specialising in public interest environmental law. We have over 30 years' experience in analysing and advising communities and governments on environmental and planning law. We welcome the opportunity to provide comment on the proposed *Environmental Planning & Assessment Amendment (Staged development Applications) Bill 2017 (Bill)*.<sup>i</sup> We have concerns about the Bill proceeding as drafted.

We understand the purpose of the Bill is to provide clarity around the staged development process following a Court of Appeal decision regarding the development of an arts precinct at Walsh Bay.<sup>ii</sup>

The effect of the proposed amendments is that for staged development applications – renamed as concept development applications - there will not be an upfront requirement to consider the impacts of actually constructing the development (or carrying out the development), only an assessment of the impact of the completed project. This was the error that the Court of Appeal identified in the Walsh Bay approval – ie, that there was no assessment of the impacts of construction of the arts precinct, just the impact of the development once it is built. The draft Bill continues the provisions in the existing legislation that once the concept is approved, consents for the following stages cannot be inconsistent with the concept. However, the draft Bill also adds provisions to explicitly state that a concept plan may apply to a single-stage development application, ie: a concept approval followed by a single DA.

We note four issues of concern.

First, the amendments provide that the new version of staged development may involve a concept plan followed by a single development application (**DA**). The intended consequence of the amendments seems to be that the proposed process will give proponents upfront certainty that their subsequent DAs will be approved prior to the assessment of all the impacts. However, it is questionable how a single-stage DA with a concept plan is any different to an ordinary development project, or why it should receive special treatment if it is not a staged DA.

For example, we are concerned that a development proponent of a single-stage development could apply to use the proposed concept plan process to avoid detailed upfront scrutiny of the 'carrying out' of the project, and thus constrain conditions placed on the subsequent DA once the impacts of carrying out the project are assessed, and other detailed impacts are clarified.

We **recommend** that a single-stage DA be assessed as an individual project, on its merits, under section 79C of the Planning Act (or equivalent) – without the constraint of having to be consistent with any prior concept plan.

Second, the draft Bill could have adverse consequences regarding multi-stage projects. The lack of a requirement to assess impacts from the carrying out of a development upfront is particularly concerning for large long-term projects where the development may be carried out over, say, 20 years. During that time the local residents would be subject to a range of direct impacts from the 'carrying out' of the whole development, such as ongoing and cumulative noise, dust, increased traffic and other impacts on their quality of life. The cumulative effect of these impacts as a whole should be assessed upfront.

For example, if an initial concept application for a 20-year coal seam gas (**CSG**) project did not have to address the impact of 'carrying out' the project, later stages of the carrying out of the project may significantly impact the surrounding community and environment, though those cumulative impacts would not have been assessed upfront. The draft amendments pose a risk that the assessment process will only consider 'chunks' of the project over time, instead of the cumulative and foreseeable impacts of the entire project, including impacts relating to the carrying out of the whole project.

We **recommend** that the Act should require assessment of cumulative construction and operational impacts at the concept stage, particularly for projects where construction and operation is a huge part of the relevant impact. As noted below, this should not detract from fully assessing each stage based on the best available science and most up to date information.

Third, we note a concern about determinations following the approval of a concept plan. We **recommend** clarifying that a consent authority has an ability to allow for assessment of new information in the subsequent consent, and that this should not be considered 'inconsistent' with concept DA. For example, the Bill could provide that a further consent is not inconsistent if it deals with impacts or details that:

- (a) were not known or not fully assessed when the concept DA was determined;  
or
- (b) were assessed when the concept DA was determined, but where new or updated information is available on those impacts or details (and the determination of further DA responds to that new or updated information).

The Bill should also clarify that in determining a development application which relates to a site to which a concept DA applies, such an application may be

determined by way of a refusal and that would not be deemed inconsistent with any concept DA.

Finally, EDO NSW has consistently submitted that a flaw in current planning law is the failure to effectively consider cumulative impacts. As noted above, the new proposal to allow concept approvals that do not adequately assess operational impacts – especially applying to large long-term projects – will further exacerbate this deficiency.

If you require further information, please contact our office on (02) 9262 6989.

Yours sincerely,  
**EDO NSW**



Rachel Walmsley  
Policy & Law Reform Director

---

<sup>i</sup> See: <http://www.planning.nsw.gov.au/conceptproposals>

<sup>ii</sup> The Walsh Bay decision is available at: <https://www.caselaw.nsw.gov.au/decision/59408d37e4b074a7c6e166eb>